GRANTED

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
CASE NO. 00-6567

(2)

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Larry Dean Dusenbery, acting pro se, pursuant to Rule 39 asks leave to file the enclosed petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of cost, and to proceed in forma pauperis.

Respectfully submitted,

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SUPREME COURT, U.S.

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
U. S. P. Allenwood
P. O. Box 3000
Whitedeer, PA 17887

87 pp

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AFFIDAVIT OF INDIGENCE

I, Larry Dean Dusenbery, declare that I am the petitioner in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost, or give security therefor, I state that because of my poverty, I am unable to pay the cost of said proceedings or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceedings or the issues I intend to present in my petition for Writ of Certiorari are briefly stated as follows:

1) Whether the court should grant certiorari to resolve the split among the circuits as to whether a prisoner must receive "actual notice" regarding a forfeiture notification.

In further support of this application, I answer the following questions:

1) Are you presently employed?

No.

2) Have you received within the past twelve months any money from any of the following sources:

A. Business, profession or other form of self-employment?

No.

B. Rent payments, interests or dividends?

No.

C. Pensions, annuities or life insurance payments?

No.

D. Gifts or inheritance?

No.

E. Any other sources?

No.

3) Do you own any cash, or do you have money in checking or savings account?

No.

4) Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property?

No.

5) List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

No dependents.

I declare under penalty of perjury that the foregoing is true and correct pursuant to 28 USC Section 1746.

FURTHER I SAYETH NOT.

Executed on 3rd day of October, 2000.

Larry Dean Dusenbery

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
CASE NO. 00-6567

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
U. S. P. Allenwood
P. O. Box 3000
Whitedeer, PA 17887

IN THE
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OCTOBER TERM, 2000
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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Larry Dean Dusenbery
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Reg. No. 50908-060
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QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000
I. CASE NO. _____

LARRY DEAN DUSENBERY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court is attached at Appendix 4 and cited at 34 F.Supp.2d 602 (N.D. Ohio 1999). The opinion of the United States Court of Appeals for the Sixth Circuit affirming the District Court is attached at Appendix 5. This is a published opinion but Petitioner does not have the cite at the time of this writing. The denial of rehearing or rehearing en banc is attached at Appendix 6.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 2000. Rehearing or rehearing en banc was denied on August 25, 2000. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

No person . . . shall be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND FACTS

The issue in this case is whether an incarcerated inmate must receive "actual notice" regarding a forfeiture notification, or does the government comply with due process requirements by sending the notice to the inmate's place of incarceration, even if the prisoner may not actually have received notice. The circuits are split on this issue.

Larry Dean Dusenbery (hereinafter "Petitioner"), was arrested on April 23, 1986. The Federal Bureau of Investigation (FBI) kicked in the door at Petitioner's residence and arrested him on a warrant for interstate flight to avoid prosecution. Thereafter, Petitioner pled guilty to a drug charge and was sentenced to twelve (12) years incarceration and a six (6) year term of special parole on July 15, 1986.

During the search of Petitioner's residence at the time of his arrest, FBI agents seized approximately $21,940 in U.S. currency, a 1984 Chevrolet Monte Carlo automobile, and an enormous amount of other miscellaneous property including jewelry, cellular telephones, leather briefcases, pagers, scanners, telephone answering machines, radar detectors, calculators, address books, wallet and clothing. (Appendix 1 at 2).

Thereafter, Petitioner filed a motion for the return of his property pursuant to Federal Criminal Rule 41 (e). (R. 74: motion for return of property). The basis for the motion was that the government had refused to return Petitioner's property or initiate legal forfeiture proceedings.

The government opposed the motion alleging that all property was either returned or forfeited. (R. 85).

Petitioner filed a reply (R. 86) stating the government did not return anything to him nor institute legal forfeiture proceedings.

On May 20, 1994, the court issued an order requesting the government to file a supplemental brief and set forth the factual setting for the factual representations set forth in its response brief. (R. 88).

The government then filed a response on July 19, 1994 (R. 92), declaring all the property that had been seized from Petitioner had been disposed of in some fashion and there was none to return.

On August 1, 1994, Petitioner filed a reply to the government's supplemental response stating that the government's documentation establishes that none of Petitioner's property was returned to him nor did the government institute legal forfeiture proceedings. (R. 93: reply to government supplemental response).

On August 3, 1994, the government filed another supplemental response (R. 94), and Petitioner filed two (2) supplemental reply briefs. (R. 95, 96).

On February 9, 1995, Petitioner moved to supplement his Rule 41 (e) motion to raise a double jeopardy issue. (R. 99).

On February 28, 1995, the court issued an order granting Petitioner leave to file a supplement raising the double jeopardy issue. (R. 100). Additionally, the court requested the government to supplement its response as to why the court should not order Petitioner's funds returned. (R. 100).

On March 15, 1995, the government filed an additional supplemental response (R. 103), and Petitioner filed a supplemental reply. (R. 104).

On April 13, 1995, the court issued an order directing the government to file a supplement response and establish that Petitioner received actual notice of the forfeiture proceedings. Additionally, that the government respond to Petitioner's double jeopardy issue, and given the fact that forfeiture has already occurred, does the court have jurisdiction to entertain Petitioner's motion. (R. 105).

On June 1, 1995, the government filed its response to Petitioner's double jeopardy issue. The government also responded that the court did not have jurisdiction to adjudicate Petitioner's Rule 41 (e) motion, stating Petitioner's action is essentially a habeas corpus proceeding. (R. 109).

On June 16, 1995, Petitioner filed an extensive reply brief setting forth the court's jurisdiction. Petitioner established by law that the court should have construed his motion pursuant to Fed. R. Crim. P. 41 (e) as a civil complaint for equitable relief. Moreover, Petitioner established that the government failed to provide him with proper notice of the forfeiture proceedings which violated his due process rights. Additionally, that the government did not even initiate forfeiture proceedings for a large amount of his property. (R. 110: reply to government's June 1, 1995 response).

On August 23, 1995, the district court assigned the case a civil number. (R. 114).

On October 5, 1995, the district court denied Petitioner's motion in a memorandum opinion declaring the court lacked jurisdiction. (R. 115). A judgment entry was entered on this same date. (R. 116).

Petitioner took a direct appeal to the Sixth Circuit Court of Appeals, and on September 25, 1996, the Sixth Circuit vacated the district court's judgment. (R. 125:

mandate) (Appendix 1). In its opinion, the Sixth Circuit stated that the district court abused its discretion in denying Petitioner's motion for lack of jurisdiction. The Sixth Circuit stated that the district court should have construed Petitioner's Rule 41 (e) motion as a civil action seeking equitable relief. Id.

Moreover, in its mandate pertaining to Petitioner's due process argument, the court stated:

> Therefore, from the evidence in the record, it is not clear that: (1) the certified mail arrived at Milan, (2) a prison employee signed for it, or (3) the notice was ultimately forwarded to Dusenbery through the prison mail system.

Id. at 3. The court ended its opinion with the following mandate:

> Consequently, we remand this case to the district court so it can construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with "actual notice" of the various forfeitures.

Id. at 4 (emphasis added).[1]

Upon remand the district court opened discovery for a period of ninety (90) days. (R. 126). Thereafter, Petitioner moved to take the telephonic deposition of James Lawson.[2] (R. 132). Both parties then moved for summary judgment. (R. 138, 139).

On July 23, 1997, the district court held an evidentiary hearing on Petitioner's motion for return of property. (R. 147: transcript of evidentiary hearing). Moreover, on this same date Petitioner took the telephonic deposition of James Lawson. (R. 148: telephonic deposition of James Lawson).

---

1 Petitioner was incarcerated at the Federal Correctional Institution (FCI) in Milan, Michigan.
2 James Lawson was a prison mail clerk who worked in the mailroom at FCI Milan.

Prior to the evidentiary hearing, the district court issued a memorandum opinion denying Petitioner's request for the return of his 1984 Chevrolet Monte Carlo, claiming that Petitioner did not have standing to claim said Monte Carlo. (R. 140: memorandum opinion). Petitioner moved for reconsideration (R. 142), but before the district court ruled on the motion, the government conceded that Petitioner had standing to challenge the forfeiture of his 1984 Chevrolet Monte Carlo. (R. 149). Thereafter, the district court denied the reconsideration motion as moot. (R. 145).

At the evidentiary hearing, Petitioner established that the property was his and the government failed to initiate any forfeiture proceedings with respect to all of his personal property. (R. 147). Therefore, the district court ordered the government to compensate Petitioner with respect to his personal property minus 25 percent because the property was used. (R. 147: tr. at 19) (Appendix 2). Additionally, at the hearing, Petitioner admitted that he purchased two of the items listed in his personal property, i.e., item 1, a cellular telephone, and item 9, a realistic pro scanner, with drug proceeds. (R. 147: tr. at 15-16) (Appendix 2 at 15-16). Therefore, the district court ordered the parties to brief the issue as to whether Petitioner should be compensated for those two items. (R. 147: tr. at 20) (Appendix 2 at 20). Moreover, the district court added item 13 (See R. 140: listing of items in memorandum opinion), a gold bracelet, into this category of items to be briefed because of the value of the bracelet. (R. 147: tr. at 20) (Appendix 2 at 20).

On this same day, July 23, 1997, Petitioner took the deposition of James Lawson. (R. 148) (Appendix 3). The purpose of the deposition was to determine whether the

government served Petitioner with notification pertaining to the $21,940 in U.S. currency seized by the FBI.

At the deposition, Mr. Lawson admitted the certified mail receipt, pertaining to the $21,940 in U.S. currency, had an incorrect Post Office box number on it, that it was possible the signature on the receipt could be someone else's, and even if it was Mr. Lawson's signature on the receipt, he could not prove the mail was ultimately forwarded to Petitioner because the institution destroyed all of their log books. (R. 148: tr. of deposition at 6-8) (Appendix 3 at 6-8). Thus, the government could not establish "actual notice" regarding its forfeiture notification pertaining to Petitioner's $21,940 in U.S. currency. Moreover, at the deposition, the government acknowledged it still had possession of Petitioner's 1984 Chevrolet Monte Carlo which could be returned if ordered by the court. (R. 145: order at p. 2, n. 1).

Furthermore, Petitioner acknowledged at the deposition that he may have purchased the 1984 Chevrolet Monte Carlo with drug proceeds but was not certain because the car was purchased, at the time of the deposition, nearly 12 years earlier. (R. 147: tr. pp. 21-22) (Appendix 2 at 21-22). It was Petitioner's position, and still is, that because the government violated Petitioner's due process rights, it lost its opportunity to forfeit the vehicle as purchased with drug proceeds because the statute of limitations expired. Therefore, the government cannot initiate legal forfeiture proceedings. Moreover, at said deposition, the district court took it upon its own, sua sponte, to concede that the vehicle was purchased with drug proceeds. Petitioner did not concede,

he only stated that the vehicle was probably purchased with proceeds. (R. 147: tr. at 22) (Appendix 2 at 22).

Additionally, Petitioner establish in prior proceedings (Appendix 1 at 4), that his 1984 Chevrolet Monte Carlo was seized and forfeited without due process of law. The government sent forfeiture notifications to numerous public residences and to the Portage County Jail. (R. 110: reply at 5). Petitioner was incarcerated at the Federal Correctional Institution in Ashland, Kentucky. The government's August 3, 1994 response indicates that the government only sent notice to the Portage County Jail and not to FCI Ashland where Petitioner was incarcerated. (R. 94: government's August 3, 1994 response). The Sixth Circuit acknowledged this fact in its mandate and the government failed to rebut these facts upon remand. (Appendix 1).

After the evidentiary hearing and deposition of James Lawson, Petitioner moved for the transcript of said proceedings. (R. 151). Upon reviewing the transcripts from both hearings, Petitioner realized the transcripts were incorrect. Therefore, Petitioner moved to correct the transcripts and recuse the district judge. (R. 157, 159). The district court recused itself and the case was reassigned to Judge Gwin. (R. 160, 161).

Thereafter, Judge Gwin scheduled a hearing on the accuracy of the transcripts. (R. 165). Additionally, all parties submitted their supplemental briefs. (R. 150, 152, 154, 158). Moreover, Petitioner filed two additional supplemental briefs based on new case law (R. 173, 176), the government filed a response thereto (R. 174), and Petitioner filed a reply. (R. 175).

At the evidentiary hearing Judge Gwin ruled that the transcripts were accurate after refusing to allow Petitioner to subpoena James Lawson in order to question him pertaining to his testimony taken at the time of his deposition. The court took judicial notice that Lawson was outside the reach of subpoena jurisdiction. (R. 184: tr. of hearing).

On January 19, 1999, the district court denied Petitioner's Rule 41 (e) motion for the return of his property by granting the government's summary judgment motion and denying Petitioner's motion for summary judgment. (R. 180, 181: opinion and order) (Appendix 4). The district court ruled, contrary to the Sixth Circuit's mandate (Appendix 1), that the government was not required to establish "actual notice" regarding the forfeiture notifications in this case. (Appendix 4 at 6-8), published at 34 F.Supp.2d 602 (N.D. Ohio 1999). Moreover, the court ruled that Petitioner was not entitled to the return of his 1984 Monte Carlo, regardless of the fact that there was not any legitimate forfeiture proceedings before the court for the court to order forfeiture under because the government violated Petitioner's due process rights regarding notification, therefore, the forfeiture was void. (Appendix 4 at 8-13). Finally, the court denied Petitioner compensation for his personal property, regardless of the fact that Judge Dowd already ordered Petitioner compensated (Appendix 2 at 19), and Judge Dowd's ruling was the "law of the case." Id. Furthermore, there was not any legitimate forfeiture proceedings before the court regarding Petitioner's personal property. Therefore, the district court was without jurisdiction to do anything but order the property returned, Petitioner compensated, or order the government to initiate legal forfeiture proceedings. The

government could not initiate legal forfeiture proceedings because the statute of limitations had expired.

On July 10, 2000, the Sixth Circuit affirmed the district court's ruling. (Appendix 5). A petition for rehearing or rehearing en banc was also denied. (Appendix 6). Petitioner now moves for certiorari in this court.

REASON FOR GRANTING THE WRIT

I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRISONER MUST RECEIVE "ACTUAL NOTICE" REGARDING A FORFEITURE NOTIFICATION?

In Mullane V. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this court held that notice must be "reasonably calculated, under all the circumstances to appraise interested parties of the action and afford them an opportunity to present their objections." Id. at 314.

In forfeiture proceedings, in addition to at least three weeks of publication of the intention to forfeit, "[w]ritten notice . . . shall be sent to each party who appears to have an interest in the seized article." 19 USC Section 1607 (a); Torres V. $36,256.80 U.S. Currency, 25 F.3d 1154, 1160 (2d Cir. 1994). Notice by publication is inadequate when the government has in its possession information which would enable it to affect actual notice on an interested party of the pending forfeiture. See Barrera-Montenegro V. United States, 74 F.3d 657, 660 (5th Cir. 1996); United States V. Woodall, 12 F.3d 791, 794 (8th Cir. 1993) (notice sent to incorrect address was unreasonable when DEA had actual knowledge of party's whereabouts). The "claimant's right to compel the agency to proceed by judicial forfeiture is an important statutory check on the government's power to forfeit private property. Therefore, the government's compliance with statutory and constitutional notice requirements are essential components of the statutory regime." Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795, 797 (8th Cir. 1993).

The federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements. Judicial review

is a fundamental safeguard against government agencies and public officials who wrongfully seize or hold a citizen's property. See Land V. Dollar, 330 U.S. 731, 738 (1947); United States V. Lee, 106 U.S. 196, 220-21 (1882). Rigorous judicial review of forfeitures began at least as early as Slocum V. Mayberry, 15 U.S. (2 Wheat) 1, 10 (1917) (Marshall, C. J.), and continues today. See United States V. James Daniel Good Real Property, 114 S. Ct. 492 (1993). Under the Tarrif Act, the statutory right to compel an agency to proceed by judicial condemnation is a vital congressional restraint on arbitrary confiscations. Yet, as in other adjudicatory settings, this right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314. Judicial review of this due process issue is therefore essential. United States V. Woodall, 12 F.3d 791, 793 (8th Cir. 1993).

When the government is incarcerating or prosecuting a property owner when it elects to proceed with a forfeiture proceeding of his property, the government has the duty to locate that person in the prison system and properly serve him with notice of the pending forfeiture proceeding in order to give the individual an opportunity to contest the forfeiture. See Woodall, 12 F.3d at 794-95:

> [I]f the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or his counsel receive actual notice of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by the judicial condemnation.

Also see Robinson V. Hanrahan, 409 U.S. 38, 40 (1972) (per curiam) (the state violated defendant's right to due process by mailing a notice of forfeiture to defendant's home

when it knew that he was in jail). Thus, where a claimant is "residing at a place of the government's choosing," the seizing agency must take steps to locate the claimant and send notice to the proper address in order to satisfy due process. Torres, supra at 1161 (a "simple call" to the Bureau of Prisons often suffices to determine where a claimant is serving his or her sentence); United States V. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995). A simple telephone call would also lead the government to the correct mailing address.

In Weng V. United States, 137 F.3d 709, 712-715 (2nd Cir. 1998), the Second Circuit ruled that pursuant to Mullane, supra, the due process clause requires more than just proof that the forfeiture notification arrived at the institution where the inmate is incarcerated. The court stated that because the property owner is entirely dependent on the institution to deliver his mail to him, fundamental fairness requires the government to show that the owner received actual notice of the proceedings himself. As stated by the Second Circuit, "[w]e do not agree that a federal agency's mailing of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner." Weng, 137 F.3d at 714 (emphasis added). "[T]he mere mailing of notice—even with a required return receipt signed not by the addressee but by the institution—does not satisfy the requirement of Mullane that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt.'" Id. at 715 (quoting Mullane, 339 U.S. at 315).

Moreover, the court stated, "when [a governmental agency] wishes to secure such a prisoner's cooperation in testifying against some important wrongdoer, it has no

difficulty in delivering the message in a manner that insures receipt." Weng, 137 F.3d at 715. In contrast, the giving of notice merely by sending a letter to the prisoner's jail is suspect for two reasons. "First, as a prisoner, the owner is unable to insure that he will receive the notice once the post office has delivered it to the institution. The owner is entirely dependent on the institution to deliver his mail to him." Id. Furthermore, "because the owner's jailer—the Bureau of Prisons—is part of the same government . . . as the agency seeking to give notice, the forfeiting agent can in all probability secure the Bureau's cooperation in assuring that the notice will be delivered to the owner." Id. Thus, the Second Circuit requires that a reliable record of the delivery to the inmate be created. Weng, at 715.

In this case, the government did not provide Petitioner with constitutionally adequate notice regarding his $21,940 in U.S. currency. Therefore, Petitioner did not receive the forfeiture notification and was unable to object to the forfeiture of his funds. First of all, the government sent notice to the wrong Post Office Box number. (Appendix 1 at 3). The address at the prison where Petitioner was at—FCI Milan—is P. O. Box 1000. The government sent notice to P. O. Box 100. (Appendix 3 at 6-8). Moreover, James Lawson—the prison mail clerk—admitted it was possible the signature on the certified mail receipt could be someone else's. (Appendix 3 at 6-8). Additionally, the certified mail receipt has an illegible signature. (Appendix 1 at 3). Furthermore, even if it was Mr. Lawson's signature on the certified mail receipt, Mr. Lawson stated he could not prove the mail was ultimately forwarded to Petitioner because the institution destroyed all of their log books. (Appendix 3 at 6-8). Finally, although the government published

notice in the Cleveland Plain Dealer in Cleveland, Ohio, Petitioner was incarcerated in Milan, Michigan and certainly was not going to see a publication in an Ohio newspaper. (Appendix 1 at 3). The government knew Petitioner was incarcerated in Michigan because the government prosecuted Petitioner and put him there. Thus, the Sixth Circuit's opinion is in error. The forfeiture is void and Petitioner's funds should be returned to him because the statute of limitations has expired for the government to initiate legal forfeiture proceedings. See Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795, 799 (8th Cir. 1993) (administrative forfeiture void due to defective notice; case remanded to vacate forfeiture and to order DEA either to return the property or initiate judicial forfeiture proceedings).

In addition to the above, there is a split in the circuits as to this issue. The Sixth, Ninth, and Tenth Circuits find that the government complies with due process requirements by sending a forfeiture notification to the inmate's place of incarceration, even if the prisoner may not actually have received the notice. See United States V. Dusenbery, No. 99-3148 (July 10, 2000) (this court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process) (Appendix 5 at 4); United States V. Clark, 84 F.3d 378, 381 (10th Cir. 1996) (concluding that government complied with due process requirements when it sent notice by certified mail to prison where claimant was incarcerated, even if claimant may not actually have received notice); United States V. Real Property, 135 F.3d 1312, 1315-16 (9th Cir. 1998) (same). The First, Second, and Eighth Circuits find that a corrections officer's signature is less than reliable assurance that the incarcerated property owner has

received actual notice. See Weng V. United States, 137 F.3d 709, 714-715 (2d Cir. 1998) ("[w]e do not agree that a federal agency's mailing of a notice of forfeiture to a federal correctional institution where the property owner is detained constitutes adequate notification of the forfeiture if the notice is not in fact delivered to the prisoner-owner. . ." "[T]he mere mailing of notice—even with a required return receipt signed not by the addressee but by the institution—does not satisfy the requirement of Mullane that the means of giving notice 'be such as one desirous of actually informing [the owner] might reasonably adopt.'"); United States V. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995) (If the government is incarcerating or prosecuting the property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness surely requires that either the defendant or his counsel receive "actual notice" of the agency's intent to forfeit in time to decide whether to compel the agency to proceed by judicial condemnation); United States V. Woodall, 12 F.3d 791, 794-95 (8th Cir. 1993) (same).

Additionally, several district courts are split on this issue. Compare United States V. Dusenbery, 34 F.Supp.2d 602 (N.D. Ohio 1999) (mail need not actually reach inmate in order to satisfy requirements of due process), with United States V. Dusenbery, 80 F.Supp.2d 744 (N.D. Ohio 2000) (inmate must actually receive notice in order to satisfy requirements of due process).

The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide. Forfeitures should only be enforced if they fall within both the letter and spirit of the law. United States V. One Ford

Coach, 307 U.S. 219, 226 (1939); United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993).

Because there is a split among the circuits regarding this important Federal question, this court should grant certiorari, reverse the lower court, and order Petitioner's funds returned to him.

II. CAN THE GOVERNMENT FORFEIT PETITIONER'S AUTOMOBILE AND PERSONAL PROPERTY WITHOUT INSTITUTING LEGAL FORFEITURE PROCEEDINGS?

The government confiscated Petitioner's 1984 Chevrolet Monte Carlo without providing Petitioner with due process of law. This was established in prior proceedings. (Appendix 1 at 4). Thus, the forfeiture is void. See United States V. Giraldo, 45 F.3d 509, 512 (1st Cir. 1995) ("If the notice turns out to have been inadequate, the forfeiture is void."); United States V. Rodgers, 108 F.3d 1247, 1255 (10th Cir. 1997); Clymore V. United States, 164 F.3d 569, 572 (10th Cir. 1999). Therefore, the district court could only order the automobile returned or direct the government to initiate judicial forfeiture proceedings. United States V. Volanty, 79 F.3d 86, 88 (8th Cir. 1996) (noting that "[w]hen an administrative forfeiture is void for lack of notice, a district court must set aside the forfeiture declaration and order DEA either to return [the] property or commence judicial forfeiture in the district court."); Glasgow V. United States Drug Enforcement Admin., 12 F.3d 795, 799 (8th Cir. 1993). Moreover, the five-year statute of limitations expired, therefore, the government is precluded from initiating judicial forfeiture proceedings. See Clymore V. United States, 164 F.3d 569, 572-574 (10th Cir. 1999).

The Sixth Circuit ruled that because Petitioner stated during an evidentiary hearing that the 1984 Monte Carlo may have been purchased with drug proceeds, the district court did not have to order the automobile returned. (Appendix 5). This ruling is in error. The district court did not have jurisdiction to do anything but order Petitioner's vehicle returned to him or direct the government to initiate judicial forfeiture proceedings because there was absolutely no forfeiture proceedings before the court. Because the five-year statute of limitations expired (See Clymore, supra), the district court's only option was to direct the government to return Petitioner's vehicle. The government lost its opportunity to forfeit the vehicle as drug proceeds when it failed to initiate legal forfeiture proceedings. See United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993).

Additionally, as to Petitioner's personal property, the government did not initiate any forfeiture proceedings. (Appendix 1 at 4). Therefore, Petitioner should have been compensated for the destruction of his personal property because the dis' .ct court was without jurisdiction to order it forfeited.

Moreover, there is an error in the Sixth Circuit's ruling. The court's ruling states that Petitioner admitted that he purchased all of his personal property with drug proceeds. This is incorrect. Petitioner only claimed to have purchased two items with drug proceeds. The transcript states:

> THE COURT: Well, what was bought by drug money and what wasn't bought by drug money?
>
> Can you go through the listing and indicate that to me? When you say "drug money," you mean the proceeds from the sale of drugs contrary to law?
>
> MR. DUSENBERY: Yes.

> THE COURT: All right.
>
> MR. DUSENBERY: The Cellular One Telephone.
>
> THE COURT: Well, why don't you just number them by the number.
>
> MR. DUSENBERY: Number 1.
>
> THE COURT: Okay.
>
> MR. DUSENBERY: Number 9, Realistic Pro Scanner. I believe that's all.

(Appendix 2 at 15-16). The government lost its opportunity to forfeit Petitioner's personal property as drug proceeds when it failed to initiate forfeiture proceedings. See United States V. Giovanelli, 998 F.2d 116 (2d Cir. 1993) (The forfeiture statutes impose no duty on a defendant to prevent the government from losing its rights through carelessness). The government cannot justify retroactive destruction of the property. How the property was obtained is irrelevant. If the government wanted to obtain forfeiture of said property as drug proceeds, it had to follow the proper channels established by Congress through the forfeiture statutes. See United States V. One Ford Coach, 307 U.S. 219, 226 (1939) (The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide). Here, the government did not exercise the statutes at all.

Because the government has taken Petitioner's automobile and personal property without instituting legal forfeiture proceedings, this Court should grant certiorari, reverse the lower court, order Petitioner's automobile returned and compensation for his personal property.

00-6557

CONCLUSION

Because of the split in the circuits and the important Federal question regarding Petitioner's automobile and personal property, the Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
U. S. P. Allenwood
P. O. Box 3000
Whitedeer, PA 17887

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing this 3rd day of October, 2000, was served upon the following:

Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

Larry Dean Dusenbery

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

SEP 25 1996

LEONARD GREEN, Clerk

LARRY DEAN DUSENBERY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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Before: GUY, RYAN, and MOORE, Circuit Judges.

Larry Dean Dusenbery appeals a district court order denying his motion for return of property filed pursuant to Fed. R. Crim. P. 41(e). The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1993, Dusenbery filed his Rule 41(e) motion, requesting the return of property seized by the Federal Bureau of Investigation (FBI) in April 1986. The district court determined that it lacked jurisdiction to entertain Dusenbery's motion because a Rule 41(e) motion was not the proper remedy for seeking return of his property. Consequently, the court denied the motion. Dusenbery has filed a timely appeal.

Upon review, we determine that the district court improperly concluded that it lacked jurisdiction to consider Dusenbery's Rule 41(e) motion. This court reviews a district court's

Appendix 1.

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determination that it lacked jurisdiction to consider a Rule 41(e) motion for an abuse of discretion. *See Frazee v. Internal Revenue Serv.*, 947 F.2d 448, 449 (10th Cir. 1991).

The district court abused its discretion in denying Dusenbery's motion for lack of jurisdiction. In his Rule 41(e) motion, Dusenbery alleged that the defendant forfeited his property without giving him adequate notice of the forfeiture. While the district court concluded that it lacked jurisdiction because Dusenbery had not followed the procedures for seeking judicial relief set forth in the forfeiture statute and regulations, Dusenbery argues that he was unable to comply with these procedures because he never received notice of the forfeiture of his property.

Since Dusenbery was raising a due process challenge to the forfeiture, the district court had jurisdiction to consider his claims. While most judicial challenges to a forfeiture are foreclosed by the plaintiff's failure to use the mechanism provided in the forfeiture statute and regulations, the federal courts have jurisdiction to entertain collateral due process attacks on administrative forfeitures, including challenges to the adequacy of notice. *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (per curiam); *Toure v. United States*, 24 F.3d 444, 445-46 (2d Cir. 1994) (per curiam); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). Although Dusenbery cannot pursue his claim in a Rule 41(e) motion because criminal proceedings against him have been completed, the district court should have construed his motion as a civil complaint seeking equitable relief. *Thompson v. Covington*, 47 F.3d 974, 975 (8th Cir. 1995) (per curiam); *Giraldo*, 45 F.3d at 511; *Toure*, 24 F.3d at 445.

Additionally, in order to assist the district court upon remand, we make several comments concerning the current state of the record. The record reveals that, in April 1986, the FBI conducted a search of Dusenbery's trailer in Atwater, Ohio and seized $21,940, a 1984 Chevrolet Monte Carlo, and a large number of Dusenbery's personal items. The government acknowledges that it subsequently forfeited this property as proceeds of drug trafficking. Although Dusenbery argues that he was not aware of these forfeiture proceedings, the government submits that it provided Dusenbery with adequate notice of the forfeiture of his property.

Before the government forfeits property, due process requires that the government provide notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Giraldo*, 45 F.3d at 511. Further, if the government is incarcerating a property owner when it elects to pursue a forfeiture action against his property, fundamental fairness requires that the defendant receive actual notice of the agency's attempt to forfeit. *Id.*; *Woodall*, 12 F.3d at 794-95. The government cannot assert that it was unaware of a property owner's location when he is incarcerated in a federal facility. *See Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1160-61 (2d Cir. 1994).

The evidence presently in the record does not appear to support the government's contention that Dusenbery had actual notice of his currency's forfeiture. The government provided evidence that, in November 1988, it sent notice of the forfeiture to three separate locations. One notice was mailed to Dusenbery's home in Atwater, Ohio; however, this certified mail was returned unclaimed. A second notice was mailed to Dusenbery at a residence in Randolph, Ohio; while this certified mail was signed for by an Edward Clouse, no evidence exists in the record concerning Clouse's relationship with Dusenbery or if Clouse ultimately provided this notice to Dusenbery. The third notice was sent to Dusenbery at the Federal Correctional Institution (FCI) in Milan, Michigan. While it is undisputed that Dusenbery was incarcerated at FCI Milan during this time, he notes that the certified mail gives an inaccurate P.O. Box for the facility. Further, the certified mail receipt contains an illegible signature. The government has not provided any additional evidence attempting to show who signed for the letter or the standard procedure for processing such a letter once it arrived at the facility. Therefore, from the evidence in the record, it is not clear that: 1) the certified mail arrived at Milan, 2) a prison employee signed for it, or 3) the notice was ultimately forwarded to Dusenbery through the prison mail system. Lastly, the government did publish notice of the forfeiture in the Cleveland Plain Dealer on three separate occasions. However, as the government knew or should have known that Dusenbery was incarcerated at FCI Milan, it is not clear that publication in an Ohio newspaper was sufficient to provide Dusenbery with notice.

The evidence supporting the notice provided by the government for the forfeiture of Dusenbery's Monte Carlo appears even more attenuated. First, the government mailed notices to Dusenbery in Randolph, Ohio and Atwater, Ohio, although the record does not reflect that anyone received and signed for this certified mail. Second, the government mailed notice to Alma Dusenbery, but the record does not reflect her relationship to Dusenbery nor does it show that she actually received this notice. Third, the government sent notice to Dusenbery at the Portage County Jail in January 1987, but the record again does not contain any signature on certified mail demonstrating receipt of this notice. Further, Dusenbery submits that he was not located at the Portage County Jail during this time but was rather incarcerated at the FCI in Ashland, Kentucky. Lastly, the government again published notice of the forfeiture on three separate occasions in the Cleveland Plain Dealer, which appears insufficient to provide notice for a prisoner incarcerated in another state.

We also note that the government has not provided any evidence that it gave Dusenbery notice of the forfeiture of his personal property. Consequently, we remand this case to the district court so it can construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures.

Accordingly, this court vacates the district court's judgment and remands this case for further proceedings. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY DEAN DUSENBERRY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 5:95CV1872
86CR0102

Akron, Ohio
Wednesday, July 23, 1997
7:55 a.m.

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE DAVID D. DOWD
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Larry Dean Dusenberry

For the Defendant: Herbert J. Villa
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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

Appendix 2

Caroline Mahnke, RMR

THE COURT: The court calls the case of Larry Dusenberry versus United States of America. The case number is 5:95CV1872. It grows out of criminal case 86CR0102. The case has a number of issues that relate to the forfeiture and seizure of property.

The plaintiff contends that the currency seized from him in the sum of $21,940 was improperly forfeited out of due process of law. He has a claim involving a 1984 Chevrolet Monte Carlo which the court has already ruled on. And what brings us here today is the third claim that personal property of the defendant was destroyed by the government without any forfeiture proceedings.

Both parties have filed motions for a summary judgment. The government has conceded by the affidavit of Steven Pyles, filed as Appendix 2 to the Court's order of May 29, 1997, that all personalty which had been seized from Mr. Dusenberry, after his criminal trial had been concluded was abandoned or destroyed as evidence. But there was no forfeiture proceeding.

Mr. Dusenberry has listed what he considers to be the property that was taken from him together with the values for that property, and the court has scheduled for today an evidentiary hearing to give Mr. Dusenberry the opportunity to give testimony, A, as to the fact that he was the owner of the property, and B, to offer testimony as to the value

of the property, give the government the opportunity to cross-examine him.

And so I believe, Mr. Dusenberry, if you're prepared to testify, I will permit you to do so. Do you wish to come forward, take the oath and testify?

MR. DUSENBERRY: Yes, your Honor.

THE COURT: Do you have a file you need to assist you in that?

MR. DUSENBERRY: Yes.

THE COURT: Would you come forward, please. I'm going to have you testify, so it's clear that you're testifying, so we'll use the witness stand.

MR. DUSENBERRY: Your Honor, could I have a pen?

THE COURT: Sure.

MR. DUSENBERRY: The one matter, before I take the stand, I filed a motion for reconsideration on a 1984 Monte Carlo. Has the court received that?

THE COURT: I am aware of that. I received it and I'm going to deny it. But right now we are not going to talk about that. What we are going to talk about is the property.

LARRY DEAN DUSENBERRY,

of lawful age, the Plaintiff herein, being first duly sworn, was examined and testified as follows:

THE COURT: Now, I would ask that you testify as

follows: Start out by saying "question," then describe the question, and then say "answer" and give the answer so that it will be clear what's the question and what's the answer for the purpose of the record and also to give the government attorneys the opportunity to object if they want to object to the question.

Do you follow me? Do you have any questions about the procedure I just outlined?

MR. DUSENBERRY: Well, in my -- I'm not sure what I'm doing here. I mean, am I going to -- are they going to question me first?

THE COURT: No, no. You're going to offer testimony as to, as I understand -- do you have a copy of the opinion, the May 29, 1997 opinion of the Court?

MR. DUSENBERRY: Yes.

THE COURT: Go get that. Maybe that will help you.

Now, if you'll turn to the bottom of page 2 where it says: "Mr. Dusenberry contends that the following list of property was seized by the government and no forfeiture proceedings were initiated. The list, together Mr. Dusenberry's opinion as to the value, follows." And then you will see on the next page is the list.

MR. DUSENBERRY: Yes.

THE COURT: Now, the government is not prepared to

concede, A, that those items listed, 1 through 17, were owned by you nor are they prepared to concede as to the values. And the purpose of the hearing today is for me to decide what in fact belonged to you and what the values are and enter judgment in that amount.

MR. DUSENBERRY: Okay.

THE COURT: So I think the first thing is: Question, what is your name. Answer, Larry Dean Dusenberry. Then go on.

DIRECT EXAMINATION OF LARRY DEAN DUSENBERRY

BY MR. DUSENBERRY:

Q. What is your name?

A. My name is Larry Dean Dusenberry.

Q. Did the property seized in April 1986, was it seized from your residence?

A. Yes.

Q. Was the property yours?

A. Yes.

Q. Was you in possession and control of the property?

A. Yes.

Q. Was anyone else in the residence?

A. No.

Q. Did anybody else own the residence?

A. No.

Q. Was you in complete possession and control of the

property?
A. Yes.
THE COURT: Let me interrupt. Does the government concede that the list of the property as set forth in the opinion on page 3 is an accurate list of that which was seized without regard to the value?
MR. VILLA: Yes, it does, your Honor.
THE COURT: Thank you.
I think now, Mr. Dusenberry, it would be helpful if you would just go, starting with number 1, and indicate when you purchased it, what you paid for it and how you arrived at that value. And just go through the whole list.
The first is the cellular telephone.
BY MR. DUSENBERRY:
Q. When did you purchase the Cellular One, audio tel, telephone contained in a brown leather briefcase?
A. Sometime in 1986.
Q. How much did you pay for the cellular telephone?
A. $1,500.
Q. Do you have the receipts for these?
A. No. The FBI seized the receipts and all other property at the time that they took all the property and destroyed them along with the other property.
THE COURT: This was seized in '86, was it, Mr. Dusenberry?

MR. DUSENBERRY: Yes.
THE COURT: Thank you.
BY MR. DUSENBERRY:
Q. Was one black leather briefcase seized?
A. Yes, sir.
THE COURT: I think it's conceded, so I think you can just go to values now.
MR. DUSENBERRY: Okay.
BY MR. DUSENBERRY:
Q. How much did you pay for the one black leather briefcase?
A. $120.
Q. When?
THE COURT: When did you buy it, Mr. Dusenberry?
MR. DUSENBERRY: I purchased the brief case approximately January of 1986.
THE COURT: Thank you.
BY MR. DUSENBERRY:
Q. Was one mobile-comm pager seized?
A. Yes.
Q. How much was it purchased for -- how much was its value?
A. Approximately $100.
Q. Was one duefone telephone answering system seize
THE COURT: May I interrupt? What does '

phrase "duefone" mean? I'm unfamiliar with that phrase.

MS. DUSENBERRY: I'm not sure, your Honor. It was listed on the inventory sheet as that.

THE COURT: Okay.

BY MR. DUSENBERRY:

Q. One black leather bag.

THE COURT: Well, wait a minute. Let's go back to the telephone answering system. Did you purchase that?

MS. DUSENBERRY: Yes.

THE COURT: From whom did you purchase it, if you can remember?

MS. DUSENBERRY: Well, I purchased it from some retail store.

THE COURT: Okay. All right, go ahead.

BY MR. DUSENBERRY:

Q. One black leather bag?

A. It was a small leather bag with a strap on it, and I paid approximately $25 for it sometimes in 1985.

Q. One realistic pro scanner. Value 175?

THE COURT: That's pro-30 scanner.

A. Value $175. And most of this property was seized back when the value of these items were set at approximately how I have them set here because the cellular telephones and scanners and whatnot, the price had went down since that time. But at that time they was a higher value. This was,

like, the first telephone in the briefcase that was made at that time. That's why the value was $1,500. And I purchased it at Cellular One.

Q. One Radio Shack antenna for cellular mobile telephone adapter.

A. It was purchased at Radio Shack, and the value was $150 in 1986.

Q. One leather -- one gray leather coat?

A. It was purchased at Bermann's in Chappel Hill Mall, and I paid $150 for it in 1986.

Q. One realistic pro-2003 scanner, value $200?

A. It was purchased in 1986 at Radio Shack.

Q. One brown address book, value $15?

A. I'm not sure where I purchased it. I purchased it in late 1985 or 1986.

THE COURT: It cost $15 for an address book?

MS. DUSENBERRY: Yes, it was a big leather address book.

THE COURT: All right.

BY MR. DUSENBERRY:

Q. One Radio Shack telephone remote control; value $35?

A. It was purchased at Radio Shack in 1985.

Q. One calculator?

A. I estimated that value. I don't know where I bought it. I will agree to $10.

THE COURT: All right.

BY MR. DUSENBERRY:

Q. One gold bracelet.

A. I purchased that on East Market Street. I don't know the name of the store. But I paid $1,500 for it in 1986, approximately February.

Q. One whistler radar detector, number 302650, value $350.

A. I believe it was purchased at Radio Shack in late 1985, December, just before Christmas.

Q. One executive memo notebook, value $25.

A. Again, I estimated that. I will concede to $15.

Q. One tel-address J.R. address/notebook; value $20?

A. I can't remember where I purchased it or when I purchased it, but it was a leather notebook. I estimate it at $20.

Q. One leather wallet; value $40?

A. I'm not sure where I purchased that either.

THE COURT: Okay. Does that complete your testimony on direct as to the values?

MS. DUSENBERRY: Yes.

THE COURT: You may cross-examine.

MR. VILLA: Thank you, your Honor.

CROSS-EXAMINATION OF LARRY DEAN DUSENBERRY

BY MR. VILLA:

Q. Mr. Dusenberry, my name is Herbert Villa. I am an Assistant United States Attorney.

Just for your information, the other two gentlemen at the table, this is James Morford. He is also an assistant United States attorney, the gentleman in the blue suit. The gentleman in the light sport jacket is named Steven Pyles, and he is an FBI paralegal specialist.

I've listened to your testimony. Do you have any evidence other than your word that this property is actually owned by you or was owned by you in 1986?

A. My answer to that is I was in possession and control of the property.

Q. You may have been in possession and control, but were you the owner?

A. Yes.

Q. And do you have any evidence to substantiate that?

A. My evidence is that I was in the house and I was in possession.

Q. But I mean, for example, did you --

A. Any receipts I have was destroyed by the FBI when they seized the property when they destroyed the other property.

Q. Was any of this property purchased on credit cards?

A. No, sir.

Q. It was purchased by cash?

A. Yes.

Q. And where did the cash come from?
A. It came from me.
Q. Were you employed?
A. No.
Q. Where did the cash come from them?
A. From selling drugs.
Q. Selling drugs. You originally filed, and you correct me if I'm wrong, a Rule 41(e) motion for return of property?
A. Yes.
Q. And that is the context in which we are here today?
A. Correct.

MR. VILLA: Now, your Honor, may I approach the witness?

THE COURT: Sure.

BY MR. VILLA:

Q. Would you please identify for the court what I've just handed you?
A. This is an -- I believe it's a Motorola flip phone.
Q. It's an ad for a Motorola flip phone?
A. Yes, this is a -- what's the date on this? 1997?
Q. It's an ad in the Cleveland Plain Dealer?
A. Yes.
Q. And what is the month?
A. This is June 6, 1997.
Q. Right, and it's an ad for a Motorola flip telephone?

A. Yes.
Q. And how much are they willing to sell the flip telephone to the public for?
A. I guess if you purchase the cell time, you get it for a dollar.
Q. One dollar for the telephone.

I would like to hand you another piece of paper.

THE COURT: Mr. Villa, I could take you back when my son went on to college, and my son himself who was a mathematician at the time, wanted a calculator. We bought him a calculator, a little calculator, paid $200 for it. Now, they give them away. I mean, that happened.

MR. VILLA: That's exactly my point, your Honor.

THE COURT: The question here is what are the values in '86; not what the values are in '97.

MR. VILLA: Your Honor, I respectfully would ask you to reconsider that statement. The context of this case is to return the property to him.

THE COURT: Well, you've destroyed the property.

MR. VILLA: We did destroy the property. However, your Honor, the property today, if we did return it to him, it's not worth $1,500. It's worth one penny. If we destroyed the property, and I say, here, Mr. Dusenberry, the government was wrong, it destroyed this particular cell phone but I will give you an identical cell phone, an

identical cell phone, it would cost the government one penny to get that cell phone, your Honor. It's not $1,500. It's one penny.

THE COURT: Well, put a question now and we will have argument later.

I wanted to point out to you that I am well aware of the fact that values changed over the years, and especially with respect to calculators and things of that sort.

Now, I'm not a cellular telephone devotee. I have no working knowledge in that area. And if you want to produce testimony about what those telephones are worth back at the time you seized it and did not return it, I will be glad to entertain that. In the meantime, cross-examine the witness.

MR. VILLA: Your Honor, I don't have any further questions of the witness.

THE COURT: Thank you.

Anything further, Mr. Dusenberry?

MR. DUSENBERRY: No, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Does the government wish to produce any testimony?

MR. VILLA: No, your Honor.

THE COURT: Very well. The court will take the matter under advisement.

Do you wish to brief the issue, Mr. Villa?

MR. VILLA: I don't think that's necessary either, your Honor.

THE COURT: All right.

Mr. Dusenberry, I would like to ask a couple questions of you. You can just handle it there at the trial table. You don't need to come back up.

You indicated in response to one of Mr. Villa's questions that you didn't have any -- that the source of the money for at least one of the purchases is drug money.

Is it your position that all these items were bought by drug money?

MR. DUSENBERRY: Yes, your Honor.

THE COURT: Well, what was bought by drug money and what wasn't bought by drug money?

Can you go through the listing and indicate that to me? When you say "drug money," you mean the proceeds from the sale of drugs contrary to law?

MS. DUSENBERRY: Yes.

THE COURT: All right.

MR. DUSENBERRY: The Cellular One telephone.

THE COURT: Well, why don't you just number them by the number.

MR. DUSENBERRY: Number 1.

THE COURT: Okay.

MR. DUSENBERRY: Number 9, realistic pro scanner. I believe that's all.

THE COURT: The pager, number 3 --

MR. DUSENBERRY: Your Honor, I'm not sure, it's been so long ago, and I was -- you know, most of my money came from that source at that time.

THE COURT: When was the last time you worked?

MR. DUSENBERRY: I hadn't worked since 1983.

THE COURT: What did you do then?

MR. DUSENBERRY: Well, 1983, '82, '83 I went to prison. '81 and '82 I worked at a bakery, and I worked for another individual helping him remodel houses. And that was the last time I've worked. I was in prison in '83 and '84. Then I was released in '84 and went back in 1986 on this case.

THE COURT: What were you convicted of in the case before me? I have no recollection of that.

MR. DUSENBERRY: It was a bank fraud -- in the 1983 case?

THE COURT: No, the case in front of me.

MR. DUSENBERRY: Oh, this was for cocaine, one kilo of cocaine.

THE COURT: And then how long -- well, of course it doesn't make any difference how long you were in prison after that.

MR. DUSENBERRY: I've never been out.

THE COURT: All right. Let's focus on 13. You say you bought that at someplace here in Akron?

MR. DUSENBERRY: Yes.

THE COURT: That's a lot of money for a gold bracelet. I mean, I'm not into gold, but can you be a little more -- can you elaborate a little bit more than that.

MR. DUSENBERRY: It was a nugget bracelet.

THE COURT: And you bought that not with drug money.

MR. DUSENBERRY: Well, I can't say for sure.

THE COURT: Do you know when you bought it?

MR. DUSENBERRY: I bought it around Christmastime of '85.

THE COURT: It was for your own use?

MR. DUSENBERRY: Yes.

THE COURT: Thank you, Mr. Dusenberry.

MR. DUSENBERRY: Thank you.

THE COURT: I believe for appellate purposes, the court needs to make fact findings.

The court finds that the defendant is entitled to the value of the property at the time it was seized and not returned.

The government is not entitled to take the benefit of

the fact that the property later decreased in value any more than the defendant would be allowed to take the position that it somehow increased in value. The value, it seems to me, should be set at the time of the seizure or at least at the time the government failed to return it.

When was the date of the defendant's conviction in this case? Can anybody enlighten me as to that? How much time had elapsed from the time of the seizure and the conviction? It's an '86 indictment. The case number is 102 which means it had to be in the first half of the year.

MR. DUSENBERRY: Would you like me to answer that?

THE COURT: Yes, if you can.

MR. DUSENBERRY: I was arrested on April 22, 1986.

THE COURT: That's the date of the seizure of these goods?

MR. DUSENBERRY: Yes.

THE COURT: They had a search warrant?

MR. DUSENBERRY: They got a search warrant later that day, yes.

THE COURT: All right. They arrested, then searched?

MR. DUSENBERRY: Right.

THE COURT: When were you convicted, that is, when did you plead guilty?

MR. DUSENBERRY: I entered a guilty plea in early July.

THE COURT: All right.

MR. DUSENBERRY: And I was sentenced approximately three weeks later in July.

THE COURT: All right, end of July.

Well, it's the Court's view that the property should have been returned as of the time of the conviction or forfeiture proceedings begun. There were no forfeiture proceeding begun.

The court is of the view that the value should be discounted because they were used, they weren't new at the time of the seizure, and the court is going to discount the value by 25 percent.

I'm going to ask for briefs, the government to brief the issue first as to whether the fact that the defendant concedes that some of the property is bought with drug money disqualifies him from the right to have the value of the property returned to him. I will ask that the government's brief be filed in two weeks and that a copy be provided to Mr. Dusenberry.

Mr. Dusenberry, I give you four weeks to respond to whatever argument they advance. We give it a little bit of time because I know there is always a problem in paperwork getting to the prisoners in the institutions. There is a

time lag. So four weeks from the date they file their brief on the issue of whether or not you're entitled to the discounted value of those items that you've admitted were bought by drugs.

And the Court is of the view that the gold bracelet should fit into that category. That's $1,500 and no physical signs of support. And you said you bought it at around Christmas of '85. It seems to me that leads inevitably to the conclusion it was drug money.

And so I will figure 1, 9 and 13 will be the issue of a brief as to whether or not you are entitled to the proceeds -- you're entitled to judgment for those amounts.

Are there any questions as to the order?

MR. VILLA: No, your Honor.

THE COURT: All right. I will look forward to getting your respective briefs.

Now, Mr. Dusenberry, we have this additional matter scheduled for today which is the deposition of somebody.

MR. DUSENBERRY: James Lawson.

THE COURT: Is he available? Have you got him available by phone?

MR. VILLA: He will be available by 10:30, your Honor.

THE COURT: Now, I have got this major trial go on that isn't going to start until 9:00. But I will re

so that we can conduct that at 10:30. And we will do it over here in the room off the courtroom where I handle status calls because I do have there the telephone that we can hook -- that we can do it, and have the court reporter there.

You'll have the opportunity to ask that person the questions that you wanted to by way of the deposition. The government will have the opportunity to ask your questions and hopefully we can do all that in about 15 to 20 minutes because I don't want to unduly interrupt this trial that's going on.

So I will see you all at 10:30.

And if you'd see to it that the defendant is over in that conference room at 10:30, I would appreciate it. Thank you.

(Recess taken, 8:30 a.m. to 10:50 a.m.)

THE COURT: Mr. Dusenberry, you heard the statements of the government that they wish to concede the fact that you have standing to assert title to the Chevrolet Monte Carlo, I guess it was, wasn't it?

MR. VILLA: Yes, your Honor.

THE COURT: How did you acquire that automobile?

MR. DUSENBERRY: That automobile was purchased from Michael Groff in 1985. I paid him in cash.

THE COURT: How much did you pay for it?

MR. DUSENBERRY: I paid $8,000 for the car.

THE COURT: What was the source of the cash?

MR. DUSENBERRY: I believe I paid some of the money and -- no, I believe I paid it all. And it was probably proceeds.

THE COURT: From drug proceeds?

MR. DUSENBERRY: From cocaine sales.

THE COURT: All right. Well, we will take that then, A, the government concedes standing, and B, the defendant concedes it was purchased by drug proceeds. And that will just be included in the other briefing schedule.

MR. VILLA: Thank you, your Honor.

THE COURT: Very well.

(Proceedings concluded at 10:51 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Caroline Mahnke 7-25-97
Caroline Mahnke, RMR Date

Caroline Mahnke, RMR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY DEAN DUSENBERRY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 5:95CV1872
86CR0102
Akron, Ohio

Telephone Deposition of
JAMES CURTIS LAWSON
Wednesday, July 23, 1997, 10:30 a.m.
Before the Honorable David D. Dowd, Judge

APPEARANCES:

For the Plaintiff: Larry Dean Dusenberry

For the Defendant:
Herbert J. Villa
James L. Morford
Assistant United States Attorneys
1880 Bank One Center
600 Superior Avenue, East
Cleveland, Ohio 44114

Court Reporter:
Caroline Mahnke
Federal Building & U.S. Courthouse
125 Market Street
Youngstown, Ohio 44503

Proceedings recorded by mechanical stenography, transcr
produced by computer-aided transcription.

Appendix 3

Caroline Mahnke, RMR

THE COURT: We are calling you today for the purpose of taking a deposition in the case of Dusenberry versus United States, 5:95CV1872.

The deposition is to be of James Lawson. Is he present?

VOICE: Yes, sir, and he is present. Let me put you on speaker phone. Do I have you, your Honor?

THE COURT: Yes.

Let me go on further with the record. Mr. Lawson?

MR. LAWSON: Yes.

THE COURT: This is Judge Dowd and I am going to preside over your deposition to be taken by Larry Dean Dusenberry, and I would ask now that you take the oath.

JAMES CURTIS LAWSON,

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: Very well. Now, present in the room is, of course, Mr. Dusenberry, a court reporter, Mr. Villa, Mr. Morford, my law clerk, several people from the marshal's office and of course Mr. Dusenberry.

Mr. Dusenberry, you made proceed now with your questions.

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERRY:

Q. For the record, please state your full name and spell

your last name.

A. James Curtis Lawson, last name spelling L-A-W-S-O-N.

Q. And what is your occupation?

A. I am employed at FCI Milan. My position is an Inmate Systems Officer.

Q. How long have you been employed in that capacity?

A. Approximately ten years.

Q. When did you begin to work in the mail room at FCI Milan?

A. I believe that was in early '88.

Q. You do not know the date?

A. I do not know specifically when I began working in the mail room, no, sir.

Q. Did you work in the mail room in November of 1988?

A. Yes, sir, I did.

Q. Have you consulted with any government officials such as Gregory Sasse or any other United States attorney, FBI agent, etcetera pertaining to today's deposition?

A. I've consulted with our staff attorney, Mr. Walasinski.

Q. And what did you discuss?

A. We simply covered my earlier statement, reviewed it.

Q. Did any government official prepare you for today's disposition?

THE COURT: It's deposition.

BY MR. DUSENBERRY:

Q. Deposition?
A. No, sir.
Q. Were you coached by any government official as to what you are to say in today's deposition?
A. No, sir, I was not.
Q. Have you had any disciplinary reports, remands, reprimands, etcetera, since you have been employed by the Bureau of Prisons?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Objection sustained.

BY MR. DUSENBERRY:

Q. Have you ever been arrested?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Sustained.

You can ask if he's ever been convicted of a felony.

BY MR. DUSENBERRY:

Q. Have you ever been convicted of a felony?
A. No, sir, I have not.
Q. Do you hold any bad feelings or prejudice against me for any reasons relating to my incarceration at FCI Milan?
A. No, sir, I do not.
Q. Have you ever been involved in any investigations pertaining to me?
A. Not to my knowledge, no.
Q. Have I ever sued you?

A. Not that I know of.
Q. Do you hold any prejudice against me for suing any of your fellow employees?
A. No, sir, I do not.
Q. Do you have any other relatives working within the Bureau of Prisons?
A. No, I do not.
Q. You have sworn out an affidavit pertaining to a certified mail receipt that relates to this case, correct?
A. Yes, I have.
Q. In your affidavit, you allege that you received a copy of the certified mail receipt from the legal department, FCI Milan, and that they received the copy from the U.S. attorney's office for the Northern District of Ohio; correct?
A. Yes, sir, that is correct.
Q. Now, this certified mail was allegedly sent November 1988, correct?
A. Yes.
Q. You claim in your affidavit that you -- after you received the certified mail receipt from the legal department which was originally sent in November 1988, [illegible] years ago, that you can identify the signature on tha[illegible] receipt, correct?
A. Yes, I can identify that as being my own.

Q. And you claim the signature on the receipt is yours?
A. That is correct.
Q. You are a hundred percent sure?
A. Yes, I am.
Q. Is it true that the receipt contains an illegible signature?
A. I can identify it as my own. I can't determine whether or not someone else would classify it as being illegible.
Q. Is it a signature or is it initials?
A. It is initials, sir.
Q. If an ordinary person was to look at the signature, could they identify the signature?
A. I doubt that.
Q. Is there any way possible that the signature could be someone else's?
A. Yes, there is that possibility.
Q. Has anyone requested you to say that it's your signature?
A. No, sir.
Q. Do you admit that the certified mail receipt has an incorrect post office box number and is not the post office box number for FCI Milan?
A. Sir, on the copy that I have of that receipt, I canr determine that. It's somewhat blurred.
Q. What is the post office box that was on the cert

mail receipt? What is the post office box for Milan, Michigan?
A. We have two post office boxes that we use for the institution. One is 9999, the other one is 1000.
Q. Are you aware that the certified mail receipt had P.O. Box 100 on it?
A. Sir, I'm looking at a photocopy and I really can't determine that.
Q. Is it a letter, the photocopy, is it on the front of a letter?
A. One moment. Yes, it is.
Q. What does it say at the top?
A. P.O. Box 100.
Q. Thank you.
So, you say that the signature could possibly be somebody else's; is that correct?
A. I guess there is that possibility, but looking at it, I can identify that as either being my signature or one very similar to it.
Q. Do you admit that all certified mail that arrives at FCI Milan must be signed in a log book and acknowledge receipt of the certified piece of mail?
A. That is correct.
Q. Can you produce this log book?
A. No, sir, I cannot.

Q. If you cannot produce the log book, do you admit that you cannot prove that whatever was attached to the certified mail receipt was ultimately forwarded to Larry Dusenberry through the prison mail system?

A. No, sir, I cannot prove that.

Q. In other words, after you signed for the mail and brought it to the mail room at FCI Milan, if it is your signature, you do not know what happened to the mail after that, correct?

A. Due to the fact that there is no longer a log book because we dispose of those one year after closing, there is no longer a paper trail that would allow us to trace that back, sir.

Q. My question to you is: Do you know what happened to the mail after it came to FCI Milan?

A. Procedure would be that I would log it in, sir, identifying your name, the registered number, or I should say the certification number, and it would be signed for by your unit team and then given to yourself.

Q. But because you do not have the log book, you do not know what happened to the mail; is that correct?

A. That is a correct statement, sir.

Q. Do the counselors in each inmate's housing unit al have a log book in which they have the inmate sign fo certified mail before the mail is given to the inma

separate log book than the log book in the mail room?

A. Sir, I do not know if that is policy because it is not something that would be pertinent to my department. That would be case workers' responsibility.

Q. Can you find that out for me?

A. Sure, I would be happy to look into that.

Q. The Bureau of Prisons does not keep these log books in an archive for later purposes such as this one?

A. No, they don't. Those are held for one year after they're closed and then they are disposed of. That is per BOP policy.

MR. DUSENBERRY: That's all I have.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. VILLA:

Q. Mr. Lawson, this is Herbert Villa, of the U.S. attorney's office.

A. Yes.

Q. I would like to get back to the issue that it's possible that the signature could be somebody else's.

If you look at that signature, of course somebody could duplicate it, perhaps, but to the best of your knowledge, t the best of your vision, is that your signature on that card?

A. Yes, sir, it is.

MR. VILLA: I don't have any further questions.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERRY:

Q. But you do admit that it's possible that signature could be someone else's?

A. I think that would be speculation. Anything is possible, but I can't identify that as being my signature.

Q. But you are not a hundred percent sure?

A. Well, I can state that that is identical to my signature, sir.

Q. But you're not sure -- you are not a hundred percent sure if it is your signature?

A. I can honestly say that is my signature, but like I said before, you know, if you want to take it into the realm of what could be, yes, it could be a forgery.

Q. It could be somebody else's signature?

A. That is possible.

MR. VILLA: Thank you.

THE COURT: I believe that concludes the deposition. Thank you very much.

Kindly, I will direct the court reporter to transcribe the deposition and then the clerks office to mail a copy to Mr. Dusenberry, and I will accept further briefing on the convening motions for summary judgment.

I would ask that each of you file your supplemental brief no later than four weeks from now which we'll set the date as -- well, let's make it August 22. Maybe it will be a little more than four weeks. And then I will consider the matter submitted. Thank you very much for everybody's cooperation, especially in Milan. Thanks.

MR. LAWSON: Thank you, your Honor.

THE COURT: This deposition here is over.

MR. LAWSON: Thank you very much. Good-bye.

THE COURT: Good-bye.

MR. VILLA: Your Honor, off the record for a minute.

(Deposition concluded 10:50 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Caroline Mahnke 7-25-97

Caroline Mahnke, RMR Date

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA.	)	CASE NO. 5:95-CV-1872 5:86-CR-102
Plaintiff.	)	
v.	)	Judge James S. Gwin
LARRY DEAN DUSENBERY.	)	
Defendant.	)	OPINION AND ORDER

On March 26, 1997, Defendant Larry Dean Dusenbery filed a motion for summary judgment in this forfeiture case. [Doc. 138]. On March 28, 1997, Plaintiff United States filed a motion for summary judgment. [Doc. 139]. Both parties supplemented their motions with later briefs. [Docs. 152, 154, 173, 174, and 175].

In this opinion, the Court must determine whether a genuine issue of material fact exists regarding whether the government provided proper notice to Defendant Dusenbery when forfeiting cash proceeds from drug sales. The Court finds that Plaintiff United States provided proper notice.

APPENDIX 4

The Court must also determine whether Plaintiff Dusenbery has a right to compensation for personal property that was destroyed upon his conviction or for which he had improper notice of forfeiture. The Court finds that Defendant Dusenbery is not entitled to compensation for the personal property.

Accordingly, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 29, 1986, Defendant Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property.

After Defendant Dusenbery's conviction.[1] the government, with the assent of the U.S. Attorney's Office, abandoned or destroyed Dusenbery's personal property as evidence. No official forfeiture proceeding was initiated. Dusenbery's right to compensation for this property is at issue.

The government initiated administrative forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(6) with regard to the cash and the automobile as proceeds of drug sales. Defendant Dusenbery did not file a bond to stop the administrative proceedings as required by C.F.R. § 1316.76 and the forfeiture proceeded. Dusenbery claims he did not do so because he never received notice of the forfeiture proceedings.

[1] Dusenbery pled guilty to the drug charge and was sentenced on July 15, 1986.

In 1993, Plaintiff Dusenbery filed a Rule 41(e) motion requesting the return of the seized property. United States District Judge David D. Dowd denied Dusenbery's motion for lack of jurisdiction.[2] On September 25, 1996, the United States Court of Appeals for the Sixth Circuit vacated the judgment and remanded the case.[3] The Sixth Circuit directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures."[4]

Subsequent to the Sixth Circuit opinion, both parties in this case filed motions for summary judgment.

On May 29, 1997, District Court Judge Dowd ordered an evidentiary hearing to determine the value of the personal property and the validity of a prison employee's declaration that notice of the cash's forfeiture was received at the prison where Defendant Dusenbery was incarcerated. At the hearing, the Court presided over a telephone deposition of James Lawson, an Inmate Systems Officer and the Federal Correctional Institution in Milan, Michigan, where Defendant Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered.

At the hearing, District Court Judge Dowd determined that the personal property should have been returned upon Dusenbery's conviction. Because no forfeiture proceeding was initiated regarding the personal property and the property

[2] A complete history of the procedure of this case is set forth in District Judge Dowd's opinion of October 5, 1995 [Doc. 115].

[3] Doc. 121.

[4] *Id.*

had been destroyed, Judge Dowd found that Defendant Dusenbery was entitled to the value of the personal property at the time it was seized and not returned. Judge Dowd reduced the value of the property by twenty-five percent because the property was not new at the time of the seizure.

Also at the hearing, Defendant Dusenbery admitted he purchased items of personal property and the 1984 Monte Carlo with proceeds from drugs sales. District Court Judge Dowd directed the parties to brief the issue whether Defendant Dusenbery was entitled to the value of personal property and the vehicle bought with drug money.

On September 15, 1997, before rendering a decision on the issues in this case, District Court Judge Dowd granted Defendant Dusenbery's request for recusal.[5] The case was ultimately reassigned to District Court Judge James S. Gwin, who determines the pending issues herein.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56 (c) states the procedure for granting summary judgment and says in pertinent part:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In considering a motion for summary judgment, the court must view the fact and all inferences to be drawn therefrom in the light most favorable to the non-mo

[5] Doc. 160.

party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir. 1985). The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *60 Ivy Street Corp.*, 822 F.2d at 1435.

Essentially factual disputes about matters essential to adjudication preclude the Court from granting summary judgment. *See id.* But not every factual dispute between the parties will prevent summary judgment. Rather, the disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The factual dispute must also be genuine. The facts must be such that if they were proven at trial a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *60 Ivy Street*, 822 F.2d at 1435 (citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Thus, the judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue a proper jury question, and not to judge the evidence and make findings of fact. "[A]t the

summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *60 Ivy Street*, 822 F.2d at 1436 (quoting *Anderson*, 477 U.S. at 249).

Both Plaintiff United States and Defendant Dusenbery move for summary judgment. The Court addresses the relevant issues in turn.

III. ANALYSIS

A. $21,939 in Cash

Defendant Dusenbery claims he never received proper notice that forfeiture proceedings regarding the seized cash had been instituted. The Court disagrees and grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion on this issue.

The government admits that the address on the notice was incorrect; instead of reading P.O. Box 1000, the notice was addressed to P.O. Box 100 in Milan, Michigan. The certified mail receipt contained an arguably illegible signature. In its opinion directing District Court Judge Dowd to evaluate the notice in this case, the Sixth Circuit pointed out that the government had not, as of that date, produced sufficient evidence that a prison employee signed for the forfeiture notice or the standard procedure for processing such notice once it arrived at the prison.

Since the Sixth Circuit's opinion, the government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Mr. Lawson attests that he signed the certified mail receipt and described the process for forwarding

mail to the inmates.[6] Mr. Lawson's deposition testimony is consistent with his affidavit.

Defendant Dusenbery counters Mr. Lawson's testimony one two grounds. First, Dusenbery argues that even if the Court accepts that notice arrived at the Milan facility, the government cannot show that notice was forwarded to him. Second, Dusenbery points out that Mr. Lawson admitted he could not be "100%" certain that the signature on the receipt was his; that is, there is a "possibility" that the signature was forged or was signed by the owner of P.O. Box 100 instead of P.O. Box 1000. The Court is not persuaded by Defendant Dusenbery's arguments.

First, the Sixth Circuit does not require the government to show the mail actually reached an inmate in order to satisfy requirements of due process. In *United States v. Real Property, Tree Top, et al.*, 129 F.3d 1266 (TABLE), 1997 WL 702771 (6th Cir. 1997), the Sixth Circuit addressed a contention of inadequate notice posed by an inmate at the Milan facility. The Sixth Circuit found that proof of certified mail sent to an inmate's place of residence satisfied the inmate's due process rights. *Id.* at *2.

The government in this case has provided persuasive evidence that a prison mail room employee, Mr. Lawson, signed the certified mail receipt. This notice was reasonably calculated to notify Defendant Dusenbery of the forfeiture action. Under *Tree Top*, it is not the government's burden to show, as Defendant Dusenbery argues,

[6] Mr. Lawson states that as a Mail Room employee at the Milan facility, he reviewed and signed the certified mail receipt. All certified mail is entered into a log book before the mail leaves the Mail Room. A staff member assigned to the inmate signs for the inmate's mail and delivers it to the inmate. Mr. Lawson states that the log book no longer exists. According to prison policy, the log books are disposed of after one year.

that he actually received the notice.[7]

Dusenbery's assertion that there is a possibility of forgery is similarly unconvincing. Even viewing Dusenbery's argument in a light most favorable to him, the Court cannot recognize a mere possibility of forgery as sufficient evidence to survive a summary judgment motion.

Accordingly, the Court grants the government's motion and denies Defendant Dusenbery's motion with regard to the $21,940 in cash.

B. 1984 Monte Carlo and Miscellaneous Personal Property

Defendant Dusenbery argues that the government's notice of forfeiture regarding the Monte Carlo was insufficient to notify him of the proceeding. Dusenbery

[7] Defendant Dusenbery argues this Court cannot rely on *Tree Top*, an unpublished opinion, for its decision here. Dusenbery is correct that Sixth Circuit Rule 24(c) states citation of unpublished opinions is disfavored except for establishing res judicata, estoppel, or the law of the case.

However, the rule also states:

> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

The government included a copy of *Tree Top* in its supplemental pleading, Doc. 174. It is undisputed that Defendant Dusenbery received a copy of the opinion, as he references it in his supplemental pleading, Doc. 175.

The sufficiency of notice is a material issue in this case and no other published opinion of the Sixth Circuit falls as squarely on the facts of this case as *Tree Top*. The *Tree Top* opinion is also significant because it was decided after the Sixth Circuit's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point. Therefore, Defendant Dusenbery's argument that this Court should not rely on *Tree Top* is of no moment.

also claims violation of his due process rights when the government destroyed miscellaneous items of personal property after his conviction. Dusenbery makes no allegations of illegal seizure of the car or items of personal property. The government concedes Dusenbery has standing to bring claims about the car despite the fact that Dusenbery's stepmother is the titled owner.[1]

At the hearing to determine the value of the personal property, Defendant Dusenbery admitted that the car and personal property were purchased with drug proceeds. District Court Judge Dowd directed the parties to brief the Court about whether Dusenbery's admission disqualifies him from having his vehicle returned to him for lack of proper notice or from being compensated for the personal property's destruction without a forfeiture proceeding.

In other words, this Court is not presented with the issue of sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the destruction of his personal property.[2] Instead, this Court must determine whether Defendant Dusenbery is entitled to compensation. The Court finds he is not.

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[1] Doc. 149.

[2] The Court notes that there appears to be no issue of notice to resolve. In its opinion confirming the district court's jurisdiction over the case, the Sixth Circuit directed the Court to determine the propriety of the government's notice regarding forfeiture of the $21,939 in cash and the Monte Carlo. This Court has already determined that notice regarding the cash was sufficient. *See* Part III.A, *supra*.

With regard to forfeiture of the Monte Carlo, the Sixth Circuit noted the attenuated nature of the evidence of notice. *See* Doc. 121, at 4. Since the Sixth Circuit's opinion, this Court can find no record of the government's offering evidence to support the legitimacy of notice of forfeiture of the Monte Carlo. Further, the evidentiary hearing transcript indicates Dusenbery was entitled to compensation, prior to his admission that the car and personal property were purchased with drug proceeds. Therefore, this Court addresses only the effect of Dusenbery's admission on his right to compensation.

The Court notes first that although Judge Dowd identified three items of personal property as being purchased with drug proceeds, Defendant Dusenbery's testimony at the hearing indicates that all items of personal property were purchased with drug proceeds:

> Q: Was any of this [personal] property purchased on credit cards?
>
> A: No, sir.
>
> Q: Was it purchased by cash?
>
> A: Yes.
>
> Q: And where did the cash come from?
>
> A: It came from me.
>
> Q: Were you employed?
>
> A: No.
>
> Q: Where did the cash come from then?
>
> A: From selling drugs.
>
> * * * *
>
> The Court: You indicated . . . that the source of the money for at least one of the purchases is drug money. Is it your position that all these items were bought with drug money?
>
> Mr. Dusenbery: Yes, your honor.

Evidentiary Hearing Transcript, Doc. 147, at 11-12, 15.

With regard to the Monte Carlo, the Court found it was purchased with drug

proceeds:

> The Court: How did you acquire that automobile?
>
> Mr. Dusenbery: That automobile was purchased from Michael Groff in 1985. I paid him in cash.
>
> The Court: How much did you pay for it?
>
> Mr. Dusenbery: I paid $8,000 for the car.
>
> The Court: What was the source of the cash?
>
> Mr. Dusenbery: I believe I paid some of the money and — no I believe I paid it all. And it was probably proceeds.
>
> The Court: From drug proceeds?
>
> Mr. Dusenbery: From cocaine sales.
>
> The Court: All right. Well, we'll take that . . . the defendant concedes it was purchased by drug proceeds.

Evidentiary Hearing Transcript, Doc. 147, at 22.

Defendant Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983 — two years before any of the items or the car at issue was purchased — lead this Court to find that all items of personal property and the car were purchased with drug proceeds. Therefore, the Court's disposition on the issue of compensation applies equally to all the personal property and the Monte Carlo.

Defendant Dusenbery argues he is entitled to compensation for the violation of his rights. The Court is not persuaded.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In the Sixth Circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). As another court explained, someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity." *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994). The Sixth Circuit specifically pointed to *Tilley* for support in the *Salinas* opinion.

Although proper notice was not at issue in either *Salinas* or *Tilley*, the general principle in those cases remains. Defendant Dusenbery has no property rights in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenbery to retain the fruits of illegal activities, his involvement in which is undisputed.

In short, Defendant Dusenbery concedes he purchased the property with drug proceeds. He does not challenge the legality of the seizure of this property. In light of these concessions, this Court can find no genuine issue of material fact which survives for trial.

Further, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity.

Accordingly, the Court declines to exercise its equitable powers to compensate

Case No. 5:95-CV-1872 (5:86-CR-102)
Gwin, J.

Defendant Dusenbery regarding the Monte Carlo and the personal property.

IV. CONCLUSION

For the reasons described herein, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

IT IS SO ORDERED.

Date: January 15, 1999

Hon. James S. Gwin
U.S. District Judge

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA.	CASE NO. 5:95-CV-1872 5:86-CR-102
Plaintiff.	
v.	Judge James S. Gwin
LARRY DEAN DUSENBERY.	ORDER
Defendant.	

The Court has entered its memorandum opinion in the above-captioned case. For the reasons stated therein, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

Accordingly, this action is terminated pursuant to Fed. R. Civ. P. 58.

IT IS SO ORDERED.

Date: January 15, 1999

Hon. James S. Gwin
U.S. District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0269P (6th Cir.)
File Name: 00a0269p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY DEAN DUSENBERY,
Defendant-Appellant.

No. 99-3148

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 95-01872—James S. Gwin, District Judge.

Submitted: June 15, 2000

Decided and Filed: July 10, 2000*

Before: MARTIN, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

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*This decision was originally issued as an "unpublished decision" filed on July 10, 2000. On August 1, 2000, the court designated the opinion as one recommended for full-text publication.

Appendix 5

COUNSEL

ON BRIEF: Larry Dean Dusenbery, Terre Haute, Indiana, pro se. Herbert J. Villa, ASSISTANT U.S. ATTORNEY, Cleveland, Ohio, for Appellee.

OPINION

PER CURIAM. Larry Dean Dusenbery appeals a district court judgment granting summary judgment for the government in this administrative forfeiture proceeding initiated pursuant to 21 U.S.C. § 881(a)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On April 29, 1986, Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property. Dusenbery's claim for compensation for this property is now at issue.

Dusenbery initially filed a Fed. R. Crim. P. 41(e) motion requesting the return of the seized property, which motion was denied. Upon appeal, this court vacated the district court's judgment and remanded the case. *See Dusenbery v. United States*, No. 95-4188, 1996 WL 549818 (6th Cir. Sept. 25, 1996) (unpublished order). We directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures." *Id.* at *3.

The district court then presided over a telephone deposition of James Lawson, an Inmate Systems Officers at the Federal Correctional Institution in Milan, Michigan, where Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered in connection with this controversy.

The district court determined that the personal property should have been returned upon Dusenbery's conviction, but some personal items had been destroyed and no forfeiture proceeding had been initiated. In addition, the district court found that Dusenbery was entitled to the value of the personal property at the time it was seized. More significant, however, at that hearing *Dusenbery admitted that he purchased the items of personal property and the 1984 Monte Carlo with proceeds from drug sales*. The district court then directed the parties to brief the issue whether Dusenbery was entitled to the value of personal property and the vehicle admittedly bought with drug money.

After the case was reassigned to another district judge, the court determined that the notice received at the Milan prison facility was reasonably calculated to notify Dusenbery of the forfeiture action, and that since Dusenbery admitted that he purchased the 1984 Monte Carlo and miscellaneous personal property with drug proceeds, he had *no property rights* in these items. Summary judgment was accordingly granted to the government, and this timely appeal followed.

This court reviews a judgment granting summary judgment de novo and uses the same standards as used by the district court. *See EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1093 (6th Cir. 1998); *Peoples Bank & Trust Co. of Madison County v. Aetna Cas. & Sur. Co.*, 113 F.3d 629, 633 (6th Cir. 1997). Summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The party opposing a motion for summary judgment "'may not rest upon the mere allegations or denial of his pleading, but . . .

must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

We conclude first that summary judgment for the government was proper regarding the $21,929 in cash. The government has provided persuasive evidence that a prison mail room employee signed the certified mail receipt. The government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Lawson attested that he signed the certified mail receipt and described the process for forwarding prison mail to the inmates. Lawson's deposition testimony is consistent with his affidavit.

Notwithstanding Dusenbery's contention that he did not receive actual notice, this notice was "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane*, 339 U.S. at 314. As the district court correctly stated, citing *United States v. Real Property, Tree Top*, No. 96-3757, 1997 WL 702771, at *2 (6th Cir. Oct. 31, 1997) (unpublished opinion), this court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process. Because adequate notice was given, Dusenbery is not entitled to relief on this claim. The *Tree Top* decision was decided after this court's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point.

At the hearing to determine the value of the personal property, Dusenbery admitted that the car and personal property were purchased with drug proceeds. Thus, the sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the

destruction of his personal property are not the issues presented in this case. Instead, the issue is simply whether Dusenbery is entitled to compensation under that admitted circumstance.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In this circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). *See also United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (Someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.").

Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983--two years before any of the items or the car at issue was purchased--leads to the conclusion that the personal property and the car involved were purchased with drug proceeds. Dusenbery had no property rights, therefore, in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenbery to retain the fruits of illegal activities, his involvement in which is undisputed. Further, as pointed out by the district court, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity. Accordingly, summary judgment for the government was proper regarding all personal property, including cash and the automobile.

Accordingly, the district court's judgment is **AFFIRMED**.

99-3148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

AUG 25 2000

LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
LARRY DEAN DUSENBERY,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: MARTIN, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

APPENDIX 6